

Control Services, Inc. and Local 32B-32J, Service Employees International Union, AFL-CIO.
Cases 22-CA-17479, 22-CA-17528, and 22-CA-17931(1) and (2)

July 19, 1994

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS STEPHENS
AND DEVANEY

On September 27, 1993, Administrative Law Judge Robert T. Snyder issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief, to which the Respondent filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions and to adopt the recommended Order as modified.

1. The Respondent excepts to the judge's finding that Elizabeth Carter was not a supervisor within the meaning of Section 2(11) of the Act. The Respondent contends that although the judge specifically found that Carter did not *exercise* any indicia of supervisory status, the judge failed to address whether Carter *possessed* any such indicia. Although we agree with the Respondent that the judge failed to make all the appropriate findings in this regard, we conclude that the record supports a finding that Carter did *not possess* any indicia of supervisory authority.

The only evidence offered by the Respondent in support of its contention that Carter possessed indicia of supervisory authority was the testimony of Carol Owens, an admitted supervisor. Owens asserted at the hearing that Carter had the authority to hire, fire, discipline employees, review work assignments, and direct the work of employees. As the judge noted, the Respondent did not offer any evidence or testimony to show that Carter actually exercised the alleged authority. In addition, the record is devoid of any evidence corroborating Owens' testimony, such as a written job description, documents referring to Carter as a supervisor, documents detailing supervisory authority, or

corroborating testimony by other employees. We find that the Respondent has produced insufficient evidence to establish that Carter is a supervisor because, as the Board stated in *Sears, Roebuck & Co.*, 304 NLRB 193 at 193 (1991), "conclusory statements made by witnesses in their testimony, without supporting evidence, does not establish supervisory authority." See also *Bowne of Houston*, 280 NLRB 1222 (1986); *American Radiator Corp.*, 119 NLRB 1715, 1718 (1958). Moreover, although the Respondent claims that Carter was the only supervisor present at the facility when Owens was absent, the record does not reflect how often, if ever, Owens was absent, nor does it reflect the authority possessed or exercised by Carter in Owens' absence. On the record as a whole, we find that the Respondent has failed to establish that Carter possessed any indicia of supervisory authority.

2. The Respondent excepts to the judge's recommendation that the Board issue a broad cease-and-desist order. A broad cease-and-desist order requires a respondent to cease and desist from "in any other manner restraining or coercing [its employees] in the exercise of their Section 7 rights to organize and bargain collectively or to refrain from such activities" and is issued when a respondent is "shown to have a proclivity to violate the Act or has engaged in such egregious or widespread misconduct as to demonstrate a general disregard for the employees' fundamental statutory rights." *Hickmott Foods*, 242 NLRB 1357 at 1357 (1979).

The judge recommended a broad cease-and-desist order because, based on violations found to have been committed by the Respondent in this case and in two prior cases,² the judge found that the Respondent has exhibited a proclivity to violate the Act. We agree with the judge's recommendation, in view of the number, variety, and seriousness of the violations committed, and the fact that the maintenance of the no-solicitation rule in the present case represents a repetition of conduct found unlawful in one of the earlier cases.

3. Both parties interpret the judge's Order to require that the Respondent post a notice of its violations at each and every one of the Respondent's facilities. Although we agree with the judge that a broad cease-and-desist order is appropriate in this case, we do not believe that the Respondent's actions necessitate corporatewide posting of its violations. A broad cease-and-desist order does not automatically result in a corporatewide posting order. See, for example, *Circuit-*

¹ The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

² *Control Services*, 305 NLRB 435 (1991), *enfd.* mem. 961 F.2d 1568 (3d Cir. 1992); *Control Services*, 303 NLRB 481 (1991), *enfd.* mem. 975 F.2d 1551 (3d Cir. 1992).

Wise, Inc., 308 NLRB 1091 (1992); *Burns Security Services*, 300 NLRB 1143 (1990); and *Payfair Market*, 295 NLRB 905 (1989).

The Board has ordered corporatewide posting when, for example, it has been shown that a respondent's headquarters, divisional, and regional management levels were found to be responsible for the unfair labor practices committed at the respondent's individual facilities. *Beverly Enterprises*, 310 NLRB 222 (1993), enf. denied in relevant part Docket Nos. 93-4016, 93-4038, 93-4050 (2d Cir. 1994). In *Beverly*, the Board noted that over a 2-year period, the respondent committed approximately 135 unfair labor practices at 32 of its 35 facilities at issue. Based on the scope of the violations, and on evidence that labor relations policies at the individual facilities were directed by the national headquarters, the Board found that a corporatewide posting would address "the Respondent's pattern of thwarting union organizing campaigns and otherwise disregarding the fundamental statutory rights of its employees with a gamut of unfair labor practices." 310 NLRB at 231.

The instant case is distinguishable from *Beverly*, not only because of the sheer number of violations committed in *Beverly*, but also because the General Counsel has not produced sufficient evidence in this case to show that the unfair labor practices committed at the Lincroft facility were in any way directed by management from the Respondent's headquarters or central office. In fact, all the violations were the result of the independent acts of Owens, the Lincroft facility supervisor. Accordingly, and absent any other circumstances here justifying a departure from our usual remedy, we do not find that the facts of this case present a situation in which the extraordinary remedy of a corporatewide posting order is necessary and we will modify the recommended Order accordingly.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Control Services, Inc., Secaucus, New Jersey, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

Substitute the following for paragraph 2(c).

"(c) Post at its Lincroft, New Jersey facility, copies of the attached notice marked 'Appendix.'⁸ Copies of the notice, on forms provided by the Regional Director for Region 22, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Re-

spondent to ensure that the notices are not altered, defaced, or covered by any other material."

Julie L. Kaufman, Esq., for the General Counsel.

Joel I. Keiler, Esq., for the Respondent.

Ira Sturm, Esq. (Manning, Raab, Dealy, & Sturm), and *Eric Pearson*, Lead Organizer, for the Charging Party.

DECISION

STATEMENT OF THE CASE

ROBERT T. SNYDER, Administrative Law Judge. This case was tried before me on November 2, 3, and 4, 1992, in Newark, New Jersey. The consolidated complaint¹ alleges that Control Services, Inc. (Control Services or Respondent) refused to recognize and bargain with the Charging Union as exclusive representative of its employees in an appropriate bargaining unit, issued a written warning to an employee, promulgated and maintained unlawful no-solicitation and distribution rules, and threatened its employees with unspecified refusals for engaging in activities in support of the Union in violation, respectively, of Section 8(a)(5), (3), and (1) of the Act. In its answer, Respondent denied that it refused to bargain, that the Union had achieved majority status in the unit, or had made demand to bargain, or that it had engaged in any other conduct violative of the Act.

All parties were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, to argue orally, and to file briefs. General Counsel and Respondent have each filed posttrial briefs, which have been carefully considered. On the entire record in the case, including my observation of the witnesses and their demeanor, I make the following

FINDINGS OF FACT

I. JURISDICTION AND LABOR ORGANIZATION STATUS

Respondent Control Services, Inc., a corporation with an office and place of business in Secaucus, New Jersey, has at all times material been engaged in the provision of building services, including cleaning, janitorial, and maintenance services at various locations within the State of New Jersey. During the 12-month period ending November 30, 1991, Respondent, in the course and conduct of its business oper-

¹ At the opening of hearing, Respondent counsel sought leave to change Respondent's answer, in which it admitted receipt of the charges in Cases 22-CA-1747 and 22-CA-17258, to now deny their receipt. At this point, counsel for the General Counsel searched her files and located the original Region 2, NLRB envelopes in which the charges had been mailed, certified, to Respondent at its proper address, in one case specifically naming "Edward Turin, Pres." and in the other case, "Edward Turen." Edward Turen is the admitted president of Respondent. Both envelopes contain postal service markings and notations showing that delivery of the contents had been refused and the envelopes were returned to the sender. Based on the receipt of these envelopes and their contents into evidence, I denied Respondent's motion, with leave to explain this failure to accept delivery. No explanation was ever offered. At the time, according to Respondent's counsel, Respondent and its counsel were subject to a 10(j) injunction issued by Judge Ackerman of the Federal District Court, Newark, New Jersey, which included an order that they not refuse to accept certified or registered mail.

ations, performed services valued in excess of \$50,000 in States other than the State of New Jersey. During the same period, Respondent, in the course and conduct of its business operations, provided services in excess of \$50,000 for AT & T enterprise located in the State of New Jersey and directly engaged in interstate commerce. Respondent Control Services, Inc. admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. Respondent admits, and I also find, that the Charging Union, Local 32B-32J, Service Employees International Union, AFL-CIO (Local 32B or the Union) is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Presentation of General Counsel's Case in Chief on the Issues Relating to Respondent's Alleged Refusal to Bargain, Issuance of No-Solicitation Rules, Threats and Written Warning to an Employee

In the period prior to 1991, a company known as ISS International Service Systems, Inc. (ISS) had been employed by ISS to provide cleaning services at its Lincroft, New Jersey building location. For some time Local 389, Service Employees International Union had been the exclusive collective-bargaining representative of the cleaners employed by AT & T at the Lincroft site. Local 389 and AT & T were parties to a collective-bargaining agreement covering cleaners employed at the Lincroft site most recently for the period January 1, 1987, through December 31, 1989. In a location rider to that agreement executed by representatives for the Charging Union and ISS, the parties agreed to economic location terms to be made applicable to the cleaning employees working at the AT & T Lincroft site, effective on January 1, 1990, 1991, and 1992. Although not noted in the rider, it appears that the Charging Union was recognized as a successor to Local 389 as exclusive bargaining representative for the cleaning employees at the subject site. In the rider, wage increases and minimum rates of pay were listed for employee categories including day porters, general cleaners, group leaders, lavatory cleaners, and machine operators.

However, during the term covered by the rider, ISS lost its cleaning contract with AT & T and Respondent took over the cleaning and maintenance services at the Lincroft site.

Employee Bertha Pershing testified that she worked for ISS as an office cleaner on the night shift from October 1988 until the end of December 1990. On January 2, 1991, Pershing and approximately nine other former ISS cleaning employees were hired by Control Services to perform the same services they had previously performed for ISS at the AT & T Lincroft site, working the 6 to 10 p.m. shift. Pershing named these employees, besides herself, as Phyllis Mehan, Thomas Young, Dorothy Blake, Henry Williams, Lorraine Adams, Matthew Wilhelm, Elizabeth Carter, Christina Zwolska, and Mary Hargrove. These same 10 employees had been recommended for hire to an official of Control Services by Carolyn Owens, an admitted supervisor, in a letter dated December 31, 1990, in which Owens referred to their work habits and attendance records in suggesting their retention. At the time Owen listed herself as ISS supervisor at AT & T Lincroft.

Pershing testified that the first night of her employment by Respondent about 30 other people came in to the facility. They stripped the bathroom floors and cleaned the walls and even the light fixtures. The 30 employees returned the second night but by the third night their number had been reduced, so that, with the 10 newly retained regular cleaners, the total employees at the workplace were now 20 to 21 per night. Later evidence will show this number dropped further, with the complete elimination of all the additional startup employees at the end of the first 2 weeks.

Pershing also saw three former ISS day-shift employees at the Lincroft site after Respondent took over the cleaning operation there. She named them as George Dow, Marjorie, later identified as Marjorie Kollmack, and a Terence. She saw them when she got into work early and the three had not yet left the facility after their day shift ended.

Pershing had been shop steward for the Union for November and December 1990, the last 2 months that ISS had been the employer. On January 4, 1991, Robert, a union representative, later identified as Robert Sarason, asked Pershing if she would go on a picket line outside the facility as a former ISS employee, to try to help the other former ISS employees regain their jobs with Control Services. Starting on January 4 Pershing walked the picket line in front of the AT & T building at Lincroft for 3 to 5 days between 4 and 5:20 p.m. before going to work. She wore a placard stating "Control Services unfair, Local 32B-32J."

While on the picket line, Pershing saw Carolyn Owens on two occasions. The first time, Owens stopped her car in front of and stared at Pershing who was patrolling in the street in front of the driveway leading to the building and parking lot. The second time, on another day, Owens also looked at Pershing as she stopped her car before she drove on in to the parking lot.

On January 14, 1991, as Pershing came in to the building to go to work about 5:45 p.m., another employee walking in with her, Dottie Blake, asked her why she was on the picket line. At that point Owens, who had overheard the question, came over to Pershing and told her if she stayed on that picket line and she, Owens, were to call Control Services, Pershing would wind up losing her job. Pershing responded that on her own personal time she could do whatever she wanted to. Owens didn't reply and Pershing walked away from her and into the office to sign in for work.

Earlier in January 1991, shortly after Control Services took over the cleaning at Lincroft, at about 8 p.m. one evening, Owens spoke to Pershing and other former ISS employees who had now become employed by Control. They were standing on the main floor where all visitors came in. She told them they weren't supposed to take a break because the new company didn't allow it, but they told her they were going to take one anyway. Owens then said, "go upstairs and do it on your floor, then." Thereafter, Pershing and the other employees took a break from work at 8 p.m. in the conference room on the second floor. While the old break had been 15 minutes long, they now took 5 minutes to go to the bathroom and get a drink from the vending machines there.

A week after the break discussion, Owens handed out a pamphlet to all employees when they came in to work one night. The first page, containing Control's name at the top, was headed, "Rules of Conduct." On this page, among other

examples of causes for disciplinary action and ultimate discharge for repeated violations, was one item, paragraph 6, which read as follows:

6. Soliciting, collecting, or accepting contributions and/or distributing or collecting papers or material during work hours without approval.

The third, fourth, and fifth pages contained a list of 32 numbered items in separate paragraphs, headed, on page three, "*Building Familiarization List For Cleaning Personnel*" and containing the admonition that "*This List Is To Be Posted In All Janitorial Rooms And Must Be Read By All New Cleaners Before Starting Work.*" Paragraph 26 read as follows:

26. Soliciting is prohibited on AT & T premises by all Contractor's employees.

Sometime in early August 1991, Pershing received from Robert Sarason of the Union a form of petition with columns below headed name, address, and phone. When she received it, the petition contained the following typing at the top, "We want Local 32-b-32-j SEIU to represent us with Control Services. Regarding wages, hours, and conditions of employment. We are sick and tired of Control Services overworking us for too little pay." Pershing took the petition around to other employees to sign their names, list their addresses and phones, to have the Union represent them with their employer. Employee Thomas Young approached other employees along with Pershing. When they had procured the signatures of 13 employees to the petition, Pershing and Young went to Owens' office at quitting time one Friday in mid-August 1991, placed it on her desk, and Pershing told Owens to give the petition to Control.

The following Monday evening, as Pershing was signing in for work at 6 p.m. at Owens' office, she saw a Control notice posted on the desk informing employees they were not to solicit or conduct any union business on the premises, whether it was during their breaktime or any other time. The notice remained on the desk for a few days, and then it disappeared. While it was posted Owens told Pershing and other employees that the notice was from Control Services.

During her cross-examination, Pershing explained that even before she and Thomas Young circulated the Union's petition among employees in August 1991, perhaps as early as July or even earlier, she, Young, Christina Zwolska, and Henry Williams, among other employees, discussed among themselves their desire to keep the Union which had previously represented them in collective-bargaining with ISS. The idea for the petition originated with them, but the wording and form were provided by Union Agent Sarason.

Pershing now also noted that after Owens spoke to her about being on the picket line, and she replied that she can do whatever she wants on her own time, later that evening Owens came upstairs to her work area and told her "I didn't like the way you talked to me downstairs. I demand respect." Pershing replied, she gave respect and just told what she was doing—picketing—was on her personal time. Pershing also said if she, Owens, took her comments a particular way, that was her problem. Pershing was not disciplined, warned, or suspended for this exchange or for later calling Owens a liar to her face. Pershing later learned from another

employee that Owens praised Pershing, saying she wished she had more like her.

Pershing testified that besides herself, the other employees hired by Respondent who picketed were Henry Williams and Christina Zwolska, but while she picketed probably all week, Williams did it for 2 or 3 days and Christina for only one because she had a day job. In fact, she had asked Williams and Zwolska to join her on the picket line. The other pickets were all former ISS employees.

Pershing also explained that written rules and regulations which the employees received were provided to them in response to a request she had made, after Owens had been telling them each evening something different concerning Control Service rules of conduct on the job. The no-solicitation notice was posted on Owens' desk and mentioned by her the next workday after Pershing and Young gave her the employee union petition.

Thomas Young testified that he had also previously worked for ISS at the AT & T facility at Lincroft until January 1991, and then was hired by Control Services for the night shift, from 6 to 10 p.m. Young was employed as a floater, going from floor to floor doing the rug shampooing and other cleaning. He saw the same, three, day employees, previously employed by ISS, continue to work on the day shift for Control Services after they took over the cleaning operation in January 1991. He named two of them as Marjorie and Terence. The third one was a male. He saw them signing out as he invariably came in early to work at 5:30 p.m., Marjorie almost every day, and the other two people two or three times a week. They were the only day-shift employees he saw signing out at the end of their shift. He continued to see them signing out when he arrived at work a month later in February 1991.

Young was active on behalf of the Union. In early August 1991, Seth Gradowsky, a union organizer, gave him a union petition seeking the reinstatement of an employee named Pablo who had been fired. Young circulated it among his fellow employees and obtained their signatures. He then presented it to Carolyn Owens one evening after work in her office, telling her it was a petition for Pablo that got fired, and to send it to Control.

Young also received another petition from Gradowsky, earlier described by employee Pershing, which expressed the desire of the signatories to be represented by Local 32B regarding their wages, hours, and conditions of employment. Young corroborated Pershing that the two of them circulated the petition to obtain the employees' signatures on the document, and that Pershing accompanied him to the office when they handed it to Owens at the end of a shift to send it to Control.

During the period for time in early August that Young was circulating the petition, at around 7:30 p.m., Owens came to the second floor where he was working and told him if he didn't stop what he was doing, the union activities, he was going to get in trouble. Young asked why will he get in trouble, he had his rights to pass this petition around. Owens then walked away from him without responding.

On August 16, 1991, Young received a written warning from Owens. Owens told him she had to give him this warning because he wasn't at his work station. Young told her he was a floater, and went from floor to floor. Young ex-

plained on the record that he had no work station. The work warning, dated August 16, 1991, read as follows:

You are being conferenced on leaving work area talking. On at least 3 occasions supervision noticed equipment left unattended while you were no where around.

1. Equipment should not be left unattended.
2. Talking to fellow employees stop them from doing their work also.

It was signed by Carolyn Owens.

During his cross-examination, Young corroborated Pershing's testimony that she had picketed outside the Lincroft worksite in January 1991.

During Young's cross-examination, the parties stipulated that in his pretrial affidavit given to the Regional Office, he made reference to circulating only one petition, and that petition was the one in which the employees protested Pablo Hernandez' discharge, the large amount of work assigned for the 4-hour shift, and demanded Control Services stop committing unfair labor practices. The parties further stipulated that Young's affidavit refers only to himself as circulating the petition and obtaining employee signatures, and fails to mention Pershing in this regard.

Young also acknowledged that even though Control Services said they weren't supposed to take any breaks, he and the other employees continued to take a daily work break of about 15 minutes.

The record disclosed that due to a handicap of cerebral palsy Young has great difficulty in reading. When his affidavit was taken Young did not disclose this handicap or that he was unable to read the statement prepared by the Board agent. Some weeks later when Young disclosed this handicap to the agent, counsel for the General Counsel, she read the affidavit to him and he agreed with its contents.

On his redirect examination, when Young was handed his written warning he recognized that it was claiming he had left his work area or equipment three times, but the warning was not read to him. Although containing a place for his signature he did not sign it. Young associated this written warning with the oral warning Owens had recently given him about getting in trouble for circulating the union petition.

With specific regard to the work warning, Young further testified that in his work, he used an electrically driven buffing machine to shampoo rugs. On occasion he has pulled the electrical cord from the wall socket, wrapped it around the buffer, and left the item on the floor while he went to the bathroom. Young swore that he had never been instructed, prior to receiving the warning, about leaving his equipment unattended. In Young's own estimation, he was a floater, who was trusted as the work got done, and he took care of his equipment, leaving it wrapped up with its cord for only short periods of time and storing it at the end of his shift in the janitor room at the facility. Young also noted that Respondent had instructed the employees not to talk with other employees during their work shift, and that he had invariably complied with this directive and limited his talking to his breaktime between 7:30 and 7:45 p.m.

Eric Person, union lead organizer, testified to his familiarity with the correspondence the Union undertook with Respondent. In its initial correspondence, by letter dated De-

cember 5, 1990, addressed to Control Services, copy to its counsel, Joel Keiler, Robert Sarason, on behalf of Local 32B, refers to its inclusion of 19 applications for employment at the AT & T facility at Lincroft and to its status as representative of the building service employees employed by ISS at the same site in the course of noting Control Services' award of the contract to clean and maintain the facility, effective December 28, 1990. Sarason made application for employment on behalf of the present workers, asked for early notice of the acceptance of the applications he enclosed, the wages and benefits Control Services intends to pay, and requested an early contact to schedule negotiations for the purpose of collective-bargaining for those individuals who are, and will continue to be, represented by the Union. The Union received no response to this letter.

Subsequently, by letter dated January 24, 1991, addressed to Control Services, copy to Keiler, Sarason attached the Union's earlier December 5, 1990 letter and again requested Control to bargain with the Union for the purpose of collective-bargaining for the Control cleaners at AT & T in Lincroft, New Jersey. Sarason asked that he be contacted as soon as possible to schedule negotiations.

The evidence shows that on January 24, 1991, the Union forwarded by certified mail² the original and a copy of the January 24 letter with attachment to Control Services and Keiler. Control Services refused to accept delivery of the original letter and attachment on January 25, 1991, and it was returned to the sender. On January 28, 1991, Keiler signed, and either he or someone in his office dated, the return receipt and accepted delivery of the Union's demand letter.

Neither Control Services nor Keiler responded to the second mailing containing the January 24, 1991 demand letter and attaching the December 5 demand.

The payroll records introduced into evidence before the close of hearing, as explained and supplemented by the testimony of a knowledgeable witness, Ralph Alamo, Respondent's payroll supervisor, show the following:

Cleaning employees employed by Control Services at the AT & T Lincroft, New Jersey site are paid on a biweekly basis. Control Services also employs a group of employees it designates as a shop crew without a permanent work location, who are assigned temporarily to particular worksites to perform extra work. These employees are paid on a weekly basis.

Control Services assigned a shop crew to the AT & T site at Lincroft to aid in the startup of that site after it obtained the contract to supply the cleaning services there.

For the payroll period ending, Thursday, January 17, 1991, the records show that Control Services employed 24 regular cleaning employees at the Lincroft location and 17 tempo-

²The green card receipts completed by the sender for the letters mailed to both Control and Keiler are marked both registered and certified but the receipts and one envelope (the one refused by Control) contain printed words and label, respectively, showing the mailing to have been certified. I conclude the mailing was by certified format.

In view of the match of the certified numbers on the Union's receipt and the refused envelope and receipt signed by Keiler, respectively, I conclude, contrary to Keiler's own testimony, that he received the Union's bargaining demand, and Control Services refused the identical demand letter.

rarily assigned members of a shop crew. The departmental designation for the Lincroft site is 10B052 and that appears next to the names of each employee assigned there. However, the temporary extra workers also had another designation next to their names as well, 09A311, representing their inclusion in the shop crew. For the payroll period ending January 24, 1991, 1 week later, five names only appear, all members of the shop crew who as noted earlier, were paid on a weekly basis. For the next biweekly payroll period, ending Thursday, January 31, 1991, the same week in which the Union's bargaining demand mailed by certified mail was refused by Control Services and was accepted by its attorney and agent, Joel Keiler, Esquire, the records show that there were 23 regular employees assigned to the AT & T Lincroft worksite and no shop crewmembers, as their temporary assignment there had ended the prior week.

For both pay periods ending January 14 and 31, 1991, Carolyn Owens name appears. Furthermore, among the names of regularly assigned employees on both January 17 and 31 ending payroll, are those two identified as Control Service day-shift cleaning employees at Lincroft, Terence Grenham and Margery Kollmack.

Among the 23 employees whose names appear on the Respondent's payroll for the period ending January 31, 1991, are 13 who had been previously employed by ISS at the Lincroft site, 12 of whom had been members of the bargaining unit represented by Local 32B through the end of December 1992, and all of whom continued to remain employed at the site on their hire by Control Services, effective January 2, 1991. These 13 are Carolyn Owens, Bertha Pershing, Phyllis Mehan, Thomas Young, Dorothy Blake, Henry Williams, Lorraine Adams, Matthew Wilhelm, whose last name is spelled Willen on the payroll, Elizabeth Carter, Christina Zwolska, Mary Hargrove, Terence Grenham, and Margery Kollmack. Eliminating Carolyn Owens from the group of unit employees at the Lincroft site, as an admitted supervisor and agent, the unit is reduced to 22, of which a majority of 12 previous bargaining unit members continued to be employed by ISS' alleged successor, Control Services, at the site. Thus, the unit placement of Elizabeth Carter, alleged as a statutory supervisor by Respondent, becomes determinative of the Union's majority status among the Lincroft site employees, and will be discussed and dealt with, in the presentation of Respondent's defenses and in the analysis to follow.

B. Respondent's Presentation of Evidence in Defense to the Complaint Allegations of its Refusal to Bargain, Issuance of No-Solicitation Rules, Threats, and Written Warning

Carolina Owens testified that she was a night supervisor for Control Services at the AT & T building in Lincroft. She had been employed in the same position at the same location by ISS when ISS had the contract for cleaning services at the site. When she prepared the list of 10 former ISS employees as of December 31, 1990, whom she recommended that Control Services retain at the site, she had included Bertha Pershing's name knowing that Pershing had been most recently shop steward for Local 32B at the site. All of these employees, previously named, were employed at the site by Control Services as of January 2, 1991.

Owens was also shown a four-page list of Control Service safety, security, and building familiarization requirements which she testified she was provided when she first started as supervisor for Control Services and which she posted on the bulletin board in the Lincroft site cleaning office and gave to the employees. This list contains no reference to solicitation at the worksite, and in particular does not include paragraph 26 prohibiting soliciting on AT & T premises by all contractors' employees which Pershing swore was among the rules which she received from Owens in January 1991 within a week after Owens first informed employees they weren't supposed to take a workbreak and then, in response to employee objections, reluctantly allowed them to take one on their work floor. Neither did the document identified by Owens contain the separate sheet headed control rules of conduct which in item 6 of the examples of causes for disciplinary action prohibited soliciting, collecting, or accepting contributions and/or distributing or collecting papers or materials during work hours without approval.

The list identified by Owens appeared to be a combination of employee requirements and rules which appeared on a separate sheet provided to Pershing with the subheading, "For AT & T Bell Laboratories, Middletown," but now without that added identification, and containing three additional pages of employee requirements and rules, and noting at the end thereof that failure to comply with the above will result in disciplinary actions. The separate list which Pershing swore she was provided by Owens notes, with underlining, as earlier indicated, that it is to be posted in all janitorial rooms and must be read by all new cleaners before starting work. Both the building familiarization list for cleaning personnel identified by Pershing and the Control Services safety, security, and building familiarization requirements identified by Owens contain certain provisions describing the employees for whom the requirements were issued as "Contractor's employees," leading one reasonably to infer that AT & T had some role in their preparation and application to outside employees who work at AT & T's buildings, such as the cleaning employees employed by Respondent.

Owens was not able to point to anything relating to or appearing on the series of pages of employee requirements and rules which aided in her identification of them as the rules she actually posted and distributed. While she described them as very familiar to her because they remain posted on the bulletin board in her office, Respondent did not produce the actual, original requirements and rules posted there. Neither did the set of rules produced by either party identify the specific worksite to which they applied, certainly not Lincroft, although the set identified by Pershing included a sheet describing it as applicable to the AT & T Middletown, New Jersey location. In addition to Lincroft and Middletown, Control also supplies cleaning services for a third AT & T facility located at Freehold, New Jersey.

Owens next admitted that she did post a no-solicitation rule. She recalled it said that during working hours, anything other than work would not be discussed. Owens posted this rule on the office bulletin board after she was made aware that people were gathering in groups. She didn't know what was being discussed, but she just wanted everybody to get to work. Owens then noted that an AT & T employee had suggested that she could put something up saying that union business should not be discussed during working hours. That

notice which she handwrote on a blank piece of paper, remained posted for about 2 days, then disappeared and she never saw it again.

Owens insisted that she never enforced the rule by approaching employees personally. She identified the AT & T official who approached her as Ken Bloss. He had explained that AT & T employees were not allowed to gather in groups and discuss union business or whatever, so he didn't see where Control Services should allow it. Following this conversation she prepared and posted her own notice. Owens did not consult other Control Service officials before preparing her notice. She could not recall its exact wording but it did admonish employees that other than work they shouldn't be discussing other things. When it was removed she asked every employee when they came into her office to sign in or out if they knew of its whereabouts and no one seemed to know about it. Owens also noticed that employees stopped gathering in groups after she had posted the notice.

Owens also recounted that when she first took over her job for Control she noticed Bertha Pershing picketing. She spoke to Pershing about it, telling her she didn't think it was a good idea for her to stand outside and picket and then come in the building to work. Owens denied telling Pershing that if she were to call Control, Pershing would lose her job.

When asked if she had ever said anything to Thomas Young about passing out petitions, Owens replied that she had done so in an indirect way. She explained that she had noticed that on an occasion that Young was working with equipment, he had left it unattended. When she questioned him about it, it came out that the reason was because he was going around with a petition. Owens told him he could not leave his equipment unattended, because it was dangerous. The first time it happened, they discussed it. The second time, she gave him a warning, the warning notice previously described.

Owens also described Elizabeth Carter's duties. While employed by ISS her title had been that of leadperson. When immediately asked if she had been a supervisor, Owens described her as an assistant supervisor. She also was a union member. Owens knew because Carter complained to her about having to pay dues. When she moved from ISS to Control Services, she kept the same job. When then asked if Carter could actually fire or hire somebody, Owens responded that if she was not there, Carter could. If she was not present in the evening at Lincroft, Carter would be in charge, and was a couple of times.

According to Owens, if Carter told her she thought an employee should be fired, Owens trusted her judgment and she would authorize Carter to execute the firing. Carter also had authority to warn employees, reprimand employees, and bring them back to rework an area. Significantly Owens' responses here show that this authority or significant aspects of it were not exercised. Thus, Owens described Carter's firing authority in the conditional form, responding that "if she told me, I trusted her judgment. Yes, she could do it." (Tr. 234.) And, as to Carter's authority to actually give a written warning notice if she wanted to, Owens replied "she could have."

During her cross-examination, Owens confirmed that she never saw Carter fire or hire anybody, but that while she knew Carter had disciplined employees, she could not recall any of their names. The nature of the discipline, was telling

employees if they weren't doing their job, and telling them if someone had to go back and do something over, because it wasn't done right.

Owens also explained that in her view, when she told Pershing her picketing before work wasn't a good idea, she thought that if Pershing worked for Control, she should be happy with working.

Owens also recalled that it was when she spoke to Young the second time about leaving his equipment unattended that he told her he had been going around with a petition, that as the senior man on the job, it was up to him to do so. Owens assumed the petition had to do with the Union, since there was nothing else it could be.

Both times she spoke to Young were within the same week in August and on both occasions Young was shampooing in the lobby area, an open area. The first time he told her he had gone to the bathroom.

Elizabeth Carter left Respondent's employ in September 1991. In January 1991, Carter was paid at an hourly rate of \$6.56. Carolyn Owens was paid \$10.30 an hour. The hourly rates of the other regular night-shift cleaning employees³ ranged from a low of \$5 per hour paid to Jose Chu to a high of \$6.45 paid to Thomas Young and Henry Williams. The majority of such employees were paid \$6.20 an hour.

Other testimony regarding Elizabeth Carter's alleged supervisory status came from employee Thomas Young. During his cross-examination by Respondent's counsel he was asked whether Elizabeth Carter had signed the employee petition seeking union representation which he and Pershing had circulated among employees. She had not. According to Young, she had not because she was a working supervisor there. Young was then asked and affirmed that Carter had been a supervisor for ISS. Then, in response to the next question as to whether she remained a supervisor for Control, Young first answered yes, but, then immediately modified that response to say that she was either a supervisor or a floor-walker, to make sure the work got done. Young had earlier explained that at ISS he had been a supervisor on the second floor, doing the same work as Carter, meaning that he had taken care of the second floor, informing Owens what work wasn't done, and checking the work out. He had started out cleaning and shampooing. According to Young, Carter continued in the same position, as floorwalker checking the work and reporting what wasn't done to Owens, after she was hired by Control Services.

During his redirect examination by counsel for the General Counsel, Young clarified that when Elizabeth Carter worked for Control she stayed on the first floor with Carolyn Owens, where she performed cleaning work and was a working supervisor like he had been for ISS on the second floor.

C. Determining Credibility

I turn first to questions of credibility. The resolution of the issues as to whether Respondent promulgated and maintained certain no-solicitation rules, and posted a notice prohibiting the conduct of union activities, including circulating union

³ Some members of the startup shop crew assigned to the Lincroft site for the first weeks of January 1991 were paid at rates varying between \$7 and \$10 per hour. These employees were craftsmen with special skills who aided in preparing new worksites for the regular cleaning crews.

petitions by employees on the employer's premises, even during their own time, and whether Respondent threatened its employees with discharge or unspecified reprisals for engaging in union activity, depend, initially, on the finding of facts regarding them.⁴

As to the threats allegedly made to Pershing, I credit Pershing regarding all of her interchanges with Owens, both on the picket line and subsequently. Owens did not dispute Pershing's testimony as to Owens' immediate reaction of staring at her when Owens first saw her picketing. Pershing exhibited marked restraint in her testimony, in particular admitting use of language in her interchanges with Owens which could act to her detriment. I further credit Pershing that Owens confronted her and threatened her with the loss of her job if Owens reported Pershing's participation to management. Apart from her immediate reaction to Pershing's picketing, Owens independently expressed her feelings that Pershing, as an employee, should be happy with working instead of joining a protest to Respondent's hiring practices. By also admittedly voicing displeasure with Pershing's picketing activity, Owens admitted raising the subject, indeed, confronting Pershing with her concerns, shortly after her discovery of Pershing's involvement. These facts aid in my finding that Owens uttered the threat attributed to her.

Owens did not dispute Pershing's testimony that she permitted the continued taking of breaktime after Control Services took over, provided they did so on their work floor. Neither did Owens dispute that she provided the cleaning employees with a list of work requirements and rules. However, the list identified by Owens contained no restrictions on on-site solicitations. I credit Pershing that the work rules she received from Owens contained these restrictions. It is evident, and Owens confirmed this, that AT & T was concerned, and expressed concern to at least Owens, about contractor's employees engaging in soliciting, including union soliciting on its premises. I find that a written restriction to this effect, item 26 in a building familiarization list which was directed to be posted in all janitorial rooms and read by all new cleaners before starting work was distributed by Owens shortly after Control Services commenced operations at Lincroft, and shortly after the employee meeting at which the new Respondent employees had insisted on a continuation of their breaktime. I also find that at the same time Owens also distributed the separate sheet listing rules of conduct, including as a cause for discipline, "soliciting . . . or distributing or collecting papers during work hours without approval."

As to Owens' preparation and posting of a separate prohibition on employee conduct of union business on the premises, whether on their breaktime or any other time, I credit Pershing that Owens posted such a notice in her own handwriting and told the employees it was from Control Services. Owens, in her own testimony, acknowledged being urged by an AT & T official to post something saying union business should not be discussed during working hours, and complying with this suggestion by posting her own handwritten notice. While Owens admitted writing a prohibition against employee discussions of anything other than work during

working hours, she was careful to note that she could not recall its exact wording. I find that Owens fully complied with AT & T's wishes, already expressed in item 26 received by Respondent's employees, and endeavored through these means to inhibit employee union organizing at the facility which she believed was taking place during the breaktime which she had previously authorized.

Pershing is also credited as to Owens' later approach to Pershing after Pershing defended her right to picket on her own time.

With respect to Owens' exchanges with Young, I credit Thomas Young that Owens approached him during the time in early August 1991 that he was circulating among fellow employees the petition for union representation and told him that if he didn't stop his union activities he was going to get in trouble. Owens was well aware, and admitted, that she learned from Young himself, as to his role in soliciting signatures on the petition while he was so engaged. It was also later given to her by Pershing and Young one evening after they had collected 13 signatures.

A search of Respondent's various work rules also show no rule relating to the infraction with which Young was charged in the written warning he was given by Owens, to wit, leaving his equipment unattended. The other infraction asserted in the warning was talking to other employees.

I infer that Owens, having received from Young, another petition as well, this one seeking the reinstatement of a discharged employee, was well aware of Young's leadership role in organizing employee support for the Union. I credit Young's own testimony that his various solicitations were limited to his own time.

While Young's affidavit contains some differences from Pershing's testimony, not noting her participation in soliciting signatures for the employee, prounion petition, and in failing to refer to Owens' grant of permission to take a workbreak and in concluding that the workbreak was 15 minutes' duration, not 5 as asserted by Pershing, Young did affirm that the employees continued to take a daily break, clearly with Owens' knowledge and at least tacit approval. I find that these differences are insufficient to discredit either Young or Pershing's testimony, and, further, I am also influenced in this regard by the fact that Young could not, because of his disability, read his statement prior to his signing of it.

Analysis and Conclusions

On the basis of the credibility resolutions I have made, I conclude that by informing employee Bertha Pershing that if she stayed on the picket line, and were she to call Control Services Pershing would wind up losing her job, Supervisor Carolyn Owens threatened Pershing with discharge for engaging in protected union activity in violation of Section 8(a)(1). Pershing's conduct in picketing before starting work in a concerted effort by the Union to protest Control Services' failure to employ union members was Section 7 conduct for engaging in which her continued tenure in her job could not be threatened. I also conclude that Owens also threatened employee Thomas Young with unspecified reprisals in violations of the Act when she told him at the time he was circulating the petition for union recognition by Control Services among employees that if he didn't stop what he was doing, he was going to get in trouble. Clearly, her com-

⁴The issue of fact regarding whether Respondent received the Union's bargaining demand, disputed by Respondent Counsel Keiler, under oath, and in argument, has been earlier and separately resolved in favor of General Counsel and the Union.

ments related to his Section 7 conduct which Young readily acknowledged having engaged in and which he vocally defended in responding to this threat. The threats to both Pershing and Young clearly tended to interfere with and inhibit their free exercise of employee rights under the Act, thus meeting the test required to be applied to determine their illegality.

The threat to Young was shortly followed by a written warning which referenced his talking to fellow employees and his leaving company equipment unattended. Owens in her recital failed to reference any instance in which Young had conversations with other employees which caused an interference with work duties. Young has been credited in denying any organizational approaches to fellow employees on their working time. It also appears that Owens herself failed to distinguish between working time union solicitations in work areas which could be prohibited and nonwork area solicitations in which employees could legitimately engage on their own time. Thus her handwritten notice prohibited union solicitation or conduct on the premises without limitation, and the printed posted notices included prohibitions on soliciting on AT & T premises by all contractor's employees during work hours without approval. There is thus nothing in the record which shows that Owens was expressing concern mainly or even solely with Young's worktime conduct. It is evident that Owens was keenly aware and concerned with Young's union solicitation activity both from her prior threat to Young as well as her testimony acknowledging her knowledge of Young's conduct in this regard derived and inferred from Young himself and Young's and Pershing's testimony recounting their delivering the employee union petition to her. Further, by basing the warning and her oral explanations of it to Young on his leaving company equipment unattended, an alleged infraction not specified in any work rule or requirement, Owens and the Respondent were vulnerable to the conclusion, which I now reach, that Young's written warning was substantially motivated by his known and his disapproved union activity and that by issuing it to him Respondent violated Section 8(a)(1) and (3) of the Act. Under the Board's *Wright Line* decision, 251 NLRB 1083 (1980), enfd. on other grounds 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), and approved by the Supreme Court in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983), the General Counsel has established Respondent's unlawful motivation by a preponderance of the evidence and Control Services has been unable to prove that the warning would have been issued to Young in the absence of his protected activity.

With respect to the no-solicitation rules which Owens posted and circulated, each of them fails to comply with the requirements of the law that employers refrain from interfering with and restraining employees in the exercise of the rights to engage in union solicitation and related conduct protected by Section 7 of the Act. In one rule Respondent prohibited solicitation on AT & T premises. Such an overly broad prohibition encompasses union solicitation as well as all others and in all areas of the premises, including public and work break areas. The record established that Owens, and thus Respondent, permitted daily breaktime by employees on their own work floors. Such a broad prohibition reaches employee Section 7 conduct engaged in on their own time at break, at lunch, if eating on the premises, as well as

that engaged in before and after work in the facility and the parking lot. Because the rule is overly broad, and Respondent has failed to show that its issuance serves some legitimate employer interest, the rule is invalid on its face. *Southwest Gas Corp.*, 283 NLRB 543 (1987); *Brigadier Industries Corp.*, 271 NLRB 656, 657 (1984). While Owens pointed to the posting of her own handwritten prohibition on union conduct and solicitation as related to her observing employees gathering in groups talking and some minor things were not getting done, it is evident from Owens' own later testimony that she drew up the wording on the notice only after an AT & T representative told her to inform employees that they could not discuss union activities during work hours. By directing her prohibition to union conduct only, Owens has demonstrated the Respondent's discriminatory intent.

Owens' handwritten notice as well as the printed posted language making soliciting or distributing papers during work hours without approval, a ground for disciplinary action, also both suffer from another legal infirmity, since *Our Way, Inc.*, 268 NLRB 394, 394-395 (1983), that such ambiguous language, by failing to make clear that only solicitations on employees' working hours are being prohibited, and not that on the employees' own time, is presumptually invalid. That presumption has not been overridden in this case in the absence of any evidence that such a ban is necessary to maintain production or discipline or serve some other legitimate interest. See *Brigadier Industries Corp.*, supra, and *William H. Block Co.*, 150 NLRB 341, 342-343 (1964). I thus conclude that each of the posted no-solicitation rules violates Section 8(a)(1) of the Act.

Respondent's defense that none of the rules was enforced is incorrect and unavailing. Their posting as well as their circulation to each employee alone demonstrated to the employees their force and authority. Owens' conduct in confronting and threatening Pershing and Young about their Section 7 conduct on their own time on and in the vicinity of Respondent's work locations graphically shows Respondent's actual enforcement of the rules.

Owens also made clear in drafting and posting her own prohibition that it came from Control Services.

Finally, I turn to the allegation of Respondent's refusal to bargain. General Counsel must, of course, first establish that Control Services was a successor employer to ISS in the delivery of cleaning services at the AT & T Lincroft site. In its answer to the complaint, Respondent denied that it contracted with AT & T at its Lincroft, New Jersey facility to provide the cleaning and maintenance services previously provided by ISS contractors and since that date has assumed and been engaged in the same business operations at the same location as ISS. Respondent has further denied that it employed as a majority of its employees at the Lincroft site individuals who were previously employees of ISS at the same location. Finally, Respondent denied that by virtue of the foregoing it has continued as the employing entity and is a successor to ISS.

In *NLRB v. Burns Security Services*, 406 U.S. 283 (1972), the Supreme Court held, inter alia, that where the bargaining unit remains unchanged and a majority of the employees hired by the new employer were represented by a recently certified bargaining agent the Board was entitled to order the new employer to bargain with the incumbent union.

As to whether the new employer is a successor bound to recognize and bargain with the incumbent union, the Board looks to see whether, (1) a majority of its employees in an appropriate unit at or after the time at which the union made its bargaining demand are workers who had been employed by the predecessor, and (2) if similarities between the two operations manifest a substantial continuity between them. *Premier Products*, 303 NLRB 161 (1991); *Capitol Steel & Iron Co.*, 299 NLRB 484, 486 (1990).

The factors for making the enterprise continuity determination were summarized by the Supreme Court in *Fall River Dyeing Corp. v. NLRB*, 482 U.S. 27 at 43, as follows:

[W]hether the business of both employers is essentially the same; whether the employees of the new company are doing the jobs in the same working conditions under the same supervisors; and whether the new entity has the same production process, produces the same products, and has basically the same body of customers.

The Supreme Court, in *Fall River* also made clear that the obligation of the successor employer applies even where the union had not been certified just before the transition in employers. A union, the recognized exclusive representative of the prior employer's employees under an established collective-bargaining relationship, is entitled to a rebuttable presumption of majority status which continues despite the change in employers, so long as the new employer is, in fact, a successor of the old employer and the majority of its employees were employed by its predecessor.

Where there is a hiatus between the old employer's demise and the new employer's startup, the Supreme Court in *Fall River* concluded that this is but one factor in determining continuity of the employing enterprise and is relevant only when there are other indicia of discontinuity. *Id.* at 45. Further, the Supreme Court in *Fall River* affirmed and applied as reasonable in the successorship context the Board's "substantial and representative complement" rule which fixes the moment when the determination is to be made as to whether a majority of the successor's employees are former employees of the predecessor and thus the moment when the bargaining obligation arises. *Id.* at 47-48. In *Fall River*, as in the instant case, there was a startup period. The Court noted that the Board looks to a number of factors to determine when a substantial and representative complement has been reached, including whether the job classifications for the operation were substantially filled, whether the operation was in substantially normal production, and the size of the complement on the date in question and the time expected to elapse before a substantially larger complement would be at work as well as the relative certainty of the employer's expected expansion. *Id.* at 49.

Finally, the Supreme Court, in *Fall River*, affirmed as reasonable the Board's "continuing demand" rule in the successorship situation, holding that a union bargaining demand made prematurely remains in force until the moment when the employer attains the substantial and representative complement. *Id.* at 52. The duty to bargain on the part of the successor is triggered only when the union has made a bargaining demand.

Applying these legal principles to the facts of record, and putting aside for the moment the issue of the Union's major-

ity status, I conclude that Control Services was the successor to ISS in the business of performing cleaning and maintenance services at the Lincroft site. Despite Respondent's pleading denial, it is clear that it succeeded ICC as cleaning contractor at the Lincroft location. The business performed by Control Services differed not at all from that of the prior employer at the same site. Indeed, Control Services has continued to operate supplying the same cleaning services, performing the same jobs, under the same working conditions, work schedules and shifts, and same numbers of employees assigned to each of the two day and evening shifts, and utilizing the same overall supervisor, Carolyn Owens, as its predecessor, ICC.

The startup period, during which Control Services utilized a special work crew which it assigned for a specific limited purpose and time, concluded with the pay period ending January 24, 1991. Starting with the pay period commencing the next day, January 25, 1991, Respondent was employing its regularly assigned work crew, having removed the specially assigned crewmembers, filled all job classifications, and reached its normal service complement of employees at the Lincroft worksite.

As noted earlier, the unit placement of employee Elizabeth Carter is determinative as to whether the Union achieved majority status in the bargaining unit at the time Control Services reached its substantial and representative complement of employees and the Union made its bargaining demand.

In determining Carter's status, it is important to note that Board decisions have continually held that an employee's title does not determine his status. See, e.g., *Waterbed World*, 286 NLRB 425 (1987). There must be actual evidence that an individual alleged as a supervisor had or possessed one or more of the indicia of supervisory authority set forth in Section 2(11) of the Act. In *Polynesian Hospital Tours*, 297 NLRB 228 (1989), the Board held that evidence that an employee who observed the work of a work crew assigned to clean vehicles by a higher-level person to ascertain that the crew works steadily rather than "goofs off," and where the members of the crew knew their jobs well and needed little supervision, was not a supervisor. He neither exercised the independent judgment essential to a finding of supervisory status under the Act nor possessed any of the primary indicia of supervisory status. The Board noted that the record contained no evidence that the employee's directions of the wash crew or his authority to tell employees to get back to work if they were malingering or sleeping went beyond the routine direction of simple tasks or the issuance of low-level orders that it had found does not constitute supervisory authority, citing *Black Kettle, Ltd.*, 263 NLRB 380, 385 (1982). Accord: *Esco Corp.*, 298 NLRB 837 (1990); *The Door*, 297 NLRB 601 (1990).

It is also clear, notwithstanding Respondent's argument to the contrary,⁵ that the burden of establishing an individual's supervisory status is on the party seeking to exclude that employee from the unit. *Ohio Masonic Home*, 295 NLRB 390 (1989); *Phelps Community Medical Center*, 295 NLRB 486 at 489-490 (1989).

⁵ Respondent cites to support its erroneous contention on the government's burden here the case of *NLRB v. Beacon Light Christian Nursing Home*, 825 F.2d 1076 (6th Cir. 1987). Nothing at all in that court's opinion supports Respondent's claim.

Applying these legal principles to the facts of record, I conclude and find that Respondent has failed to sustain its burden of showing that Carter exercised any supervisory indicia, or that she acted with independent authority in overseeing in any way the work of the evening cleaning crew to which she was assigned and which Supervisor Owens herself directed during her shift.

The record is devoid of, and Respondent has failed to supply, any probative evidence that in acting as leadperson, Carter acted in other than a routine manner in watching other employees and reporting to Owens work not completed, or in having employees do work over again. Owens' testimony is much too sketchy and general to support a conclusion that Carter exercised independent judgment in the area of the relatively simple and uncompleted work to which the cleaning staff was assigned.

Respondent did not examine either of General Counsel's witnesses as to his or her working relationship with Carter during their evening work shift. Neither did Respondent call any witness with specific, detailed testimony as to Carter's claimed impact on the work assignments or tenure of any employee. In this regard, Respondent's failure to call Carter as a witness casts further doubt on Respondent's claim. While she had since left Respondent's employ, there was no assertion that her whereabouts were unknown or that she could not be contacted or was not available as a witness to present testimony about her own work functions and status. I can only conclude and infer that her testimony would not have supported Respondent's contention. *Greg Construction Co.*, 277 NLRB 1411 (1985); *Pur O Sil, Inc.*, 211 NLRB 333, 337 (1974).

The general testimony from the various witnesses does not in, itself, convince an objective observer that Carter was, or even for the most part was regarded by the employees as, a supervisor. When the employees went to a supervisor they went to Owens. Even when counsel specifically asked Young if Elizabeth Carter was a supervisor, Young immediately clarified his categorization of her and classified her as a "floorwalker"; one who makes sure that all the jobs are done. This task was exercised routinely and without any assertion of independent judgment. In addition, Carter herself used to complain to Owens about paying union dues. Lastly, although she received higher wages, the difference between her wages and a standard employee was minimal. In *Waterbed World*, supra, the identical wage issue was considered and the Board held that a slight increase in salary is "not probative of supervisory status absent evidence of independent judgment."

I thus conclude that Elizabeth Carter was not a supervisor within the meaning of Section 2(11) of the Act. Thus, at the time when the Union made its demand to bargain it represented a majority of the employees in the bargaining unit and was entitled to recognition as the employees' bargaining representative.

At the time the Union made its demand, Respondent had already reached its substantial and representative complement of employees, so that the theory of a continuing demand need not be applied here. Insofar as the Union's earlier December 5, 1990 demand letter is concerned, while a theory of continuing demand could be urged with respect to it, it preceded by some weeks the Respondent's succeeding to ISS' function as cleaning contractor at the Lincroft site in

late December, and I do not understand General Counsel's urging the theory's application since the later January 24, 1991 letter, while enclosing the earlier letter, independently makes proper and timely demand to bargain.

Finally, there appears to have been, at most, a few days' hiatus, if at all, from ISS' completion of its service obligations, to Control Services' assumption of them, and for this reason alone, aside from the many factors independently supporting the finding of successorship, it cannot be used to defeat the conclusion that Respondent was successor to ISS.

By ignoring the Union's demand, and by failing to recognize and bargain in good faith with it, Respondent breached its bargaining obligations under the Act.

Respondent nevertheless argues in its brief that because the unit previously included in the predecessor's collective-bargaining agreement included supervisors and guards and that unit continued intact under Control Services' successorship, it was clearly inappropriate and Respondent could refuse to recognize or bargain with the Union with respect to such a unit.

The evidence does not support Respondent's bald assertion that supervisors and guards were included in the predecessor's labor agreement with the Union. The recognition clause of the collective agreement in evidence provides that the employer recognizes the Union as the sole and exclusive collective-bargaining agent of all its cleaners employed at AT & T in Lincroft, New Jersey. Neither supervisors nor guards are specifically included or mentioned in any other article. There is no evidence that any guards or any supervisors other than Owens were employed by ISS or that the parties intended to include them in the bargaining unit. The location rider to the agreement executed by ISS and the Union's predecessor lists various work categories, including group leaders. Again, nothing in the record supports Respondent's claim that group leaders were statutory supervisors. And the limited evidence Respondent offered respecting Elizabeth Carter's status shows otherwise. Finally, the complaint allegation as to unit, including all cleaning employees, but excluding all office clerical employees, managerial employees, guards, and supervisors under the Act, appears to be consistent with the contract provision, if not spelled out in *haec verba*, and with the predecessor-union contract relationship. There is no warrant for Respondent's assertion that the unit alleged in the complaint was manufactured or that supervisors are included in the unit alleged as appropriate and in which Respondent refused to bargain. The Union's letter demanding bargaining for Respondent's cleaners at AT & T in Lincroft, New Jersey, is consistent with the exclusion of supervisors and the unit description contained in the contract with Control Services' predecessor, and Respondent has to date failed to respond to that demand in any way, including any response that the unit asserted is inappropriate because of an asserted inclusion of supervisors or guards.

CONCLUSIONS OF LAW

1. The Respondent, Control Services, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Local 32B-32J, Service Employees International Union, AFL-CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. By threatening its employees with discharge and unspecified reprisals because they engaged in activity in support of the Union, Respondent has interfered with, restrained, and coerced its employees in the exercise of their Section 7 rights in violation of Section 8(a)(1) of the Act.

4. By maintaining in force and effect rules prohibiting employees from engaging in union solicitations and distributions during working hours or at any location on the premises of its customers, the Respondent has engaged in unfair labor practices in violation of Section 8(a)(1) of the Act.

5. By giving a written warning to its employee, Thomas Young, Respondent has discriminated, and is discriminating, in regard to the hire or tenure or terms and conditions of employment of its employees, thereby discouraging membership in a labor organization, and has thereby engaged in unfair labor practices in violation of Section 8(a)(1) and (3) of the Act.

6. By failing and refusing to recognize and bargain with the Union as the exclusive collective-bargaining representative of its employees in a unit appropriate for the purposes of collective-bargaining consisting of all cleaning employees employed by it at the AT & T facility in Lincroft, New Jersey, excluding all office clerical employees, managerial employees, guards, and supervisors as defined in the Act, Respondent has failed and refused, and is failing and refusing, to bargain collectively and in good faith with the representative of its employees, and has thereby engaged in, and been engaging in, unfair labor practices in violation of Section 8(a)(1) and (5) and Section 8(d) of the Act.

7. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent engaged in unfair labor practices in violation of Section 8(a)(1), (3), and (5) of the Act, I shall recommend that it cease and desist therefrom and take certain affirmative actions which are necessary to effectuate the policies of the Act.

I shall recommend that Respondent, on request, bargain in good faith with the Union as exclusive representative of its unit employees and embody any understanding reached in a signed agreement. I shall also recommend that Respondent expunge from its files all references to the written warning it issued to Thomas Young and notify both Young and the Union, in writing, that it has done so and that the warning will not be used against Young in any way.⁶ Because of its proclivity to violate the Act, *Control Services*, 303 NLRB 481 (1991), where the Board found that Respondent violated Section 8(a)(1), (3), and (5) of the Act by a variety of unlawful acts, including requiring employees to remove union insignia, constructively discharging nine employees, and unilaterally changing wages and an existing condition of employment of providing union access to employees and *Control Services*, 305 NLRB 435 (1991), where the Board found it unlawfully discharged six employees because of their union activities in violation of Section 8(a)(1) and (3) of the Act,

⁶The record reflects that Young ceased employment shortly after receiving the warning. The warning, however, should not adversely affect his present or future employment and, if Respondent is unable to correspond with Young, the Union may still be able to contact him about Respondent's undertaking in this regard on his behalf.

and it had engaged in a variety of 8(a)(1) violations, including as in the instant case, maintaining rules prohibiting employees from engaging in union solicitations or distributions during working hours at various locations on the premises of Control's customers, in both of which cases the Union was the Charging Party and it and its employee adherents were the object of Respondent's unlawful conduct at various work locations in New Jersey other than Lincroft AT & T, I shall also recommend that the Board in this case issue a broad cease-and-desist order on the authority of *Hickmott Foods*, 242 NLRB 1357 (1979); *NLRB v. Entwistle Mfg. Co.*, 120 F.2d 532, 536 (4th Cir. 1941), and *NLRB v. Express Publishing Co.*, 312 U.S. 426 (1941). I shall finally recommend that Respondent be required to post a notice informing its employees of its violations of the Act and its undertakings to comply therewith.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁷

ORDER

1. The Respondent, Control Services, Inc., Secaucus, New Jersey, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening its employees with discharge or unspecified reprisals because they engaged in activities in support of Local 32B-32J, Service Employees International Union, AFL-CIO or any other union.

(b) Issuing a written warning to employees because they have engaged in union activities.

(c) Maintaining in force and effect rules prohibiting employees from engaging in union solicitations or distributions during working hours or at any location on the premises of its customers.

(d) Refusing to bargain collectively with Local 32B-32J, Service Employees International Union, AFL-CIO as the exclusive representative of its employees in the following unit with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment:

All cleaning employees who may be employed at AT & T in Lincroft, New Jersey, but excluding all office clerical employees, managerial employees, guards and supervisors as defined in the Act.

(e) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Recognize and, on request, bargain with Local 32B-32J, Service Employees International Union, AFL-CIO as the exclusive representative of all employees employed by it in the unit described in paragraph 1(c), above.

(b) Remove from its files any reference to the written warning it issued to Thomas Young and notify Young and the Union in writing that this has been done and that the warning will not be used against Young in any way.

⁷If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(c) Post at its facilities including its office and jobsite located at AT & T in Lincroft, New Jersey, copies of the attached notice marked "Appendix."⁸ Copies of the notice, on forms provided by the Regional Director for Region 22, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

⁸If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain collectively with Local 32B-32J, Service Employees International Union, AFL-CIO

as the exclusive representative of our employees in the following unit with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment.

All cleaning employees who may be employed at AT & T in Lincroft, New Jersey, but excluding all office clerical employees, managerial employees, guards and supervisors as defined in the Act.

WE WILL NOT issue written warnings to our employees because they have engaged in union activities.

WE WILL NOT maintain in force and effect rules prohibiting our employees from engaging in union solicitations or distributions during working hours or at any location on the premises of our customers.

WE WILL NOT threaten our employees with discharge or unspecified reprisals because they have engaged in activities in support of Local 32B-32J, Service Employees International Union, AFL-CIO or any other Union.

WE WILL NOT in any other manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL recognize and, on request, bargain with Local 32B-32J, Service Employees International Union, AFL-CIO as the exclusive collective-bargaining representative of our employees employed by us in the unit described above.

WE WILL notify employee Thomas Young and the Union in writing that we have removed any reference to the written warning we issued to him and that we will not use the warning against him in any way.

CONTROL SERVICES, INC.